

# The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law

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## I. Introduction

The Mediation Committee of the Bundestag and Bundesrat - no other institution in the German Basic Law has received more praise or criticism:

Is it “one of the most felicitous innovations in Germany's constitutional activities” or “the most positive institution in the entire Basic Law”? Or is it as some critics assert “a substitute and superordinate parliament” or even the “mysterious darkroom of the legislative process”?<sup>2</sup>

This article seeks to provide answers to these questions. It is however clear that the Mediation Committee has become an important instrument for achieving political compromise in Germany's legislative procedure since entry into force of the Basic Law. The committee's remit is to find a balance between the differing opinions of the Bundestag and Bundesrat concerning the content of legislation, and, through political mediation and mutual concessions, to find solutions that are acceptable to both sides. Thanks to this approach, the Mediation Committee has helped save countless important pieces of legislation from failure since it was established over 65 years ago, thus making a vital contribution to ensuring the legislative process' efficiency.

## II. Legal basis

The legal basis for the Mediation Committee is article 77 paragraph 2 of the German Basic Law - a rather short regulation consisting of only three sentences -, which stipulates that "a committee for joint consideration of bills, composed of members of the Bundestag and Bundesrat" can be convened. The composition and proceedings are regulated by rules of procedure consisting of only 13 succinct articles, which have been adopted by the plenary of both Bundestag and Bundesrat.

The wording of these provisions has - intentionally - been kept rather vague giving the Mediation Committee a considerable degree of flexibility, which is indispensable when negotiating for political compromise.

Nevertheless the committee's activities do not take place in a legal vacuum. The best practices developed in more than 65 years of its history respect the distribution of competences between Bundestag and Bundesrat in the German Basic Law, the

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<sup>2</sup> For references see: Christian Dästner, Die Geschäftsordnung des Vermittlungsausschusses, Einleitung, point 1, Berlin 1995.

general principles of parliamentary law and the case law from the Federal Constitutional Court.

Thus the Mediation Committee has its own set of rules providing a reliable legal framework for all those involved.

### III. The role of the Mediation Committee in the legislative process

The Mediation Committee is anchored within the German legislative process. With regard to the complexity of this process only a short outline shall be given to illustrate the committee's tasks and functions.

The protagonists in the legislative process are the Federal Government, consisting of the Chancellor and his/her cabinet, the Bundestag, which is elected every four years on the basis of proportional representation and the Bundesrat.

As a legislative organ the Bundesrat has a unique structure which distinguishes it from all other parliamentary institutions in the world. For the Bundesrat there are no elections; members are the Minister-Presidents and Ministers of the federal states, that is to say the members of the federal state-governments. Changes in the political structure only take place as a result of elections to a federal state parliament. The Bundesrat primarily represents the interests of the Laender in the legislative process.

The Federal Government, the Bundestag and the Bundesrat have the right to initiate legislation. 80 per cent of all draft bills are proposed by the Federal Government. Only 20 per cent relate to the Bundestag or Bundesrat.

A government draft bill is first sent to the Bundesrat for comment. The opinion of the Bundesrat is not binding at this stage. The Federal Government can give a counter statement on the Bundesrat's opinion.

The draft bill, the Bundesrat's comment and the counter-statement of the Federal Government are then sent to the Bundestag. If the Bundestag adopts the bill it is forwarded to the Bundesrat for a second passage.

If the Bundesrat agrees with the bill, it can be sent to the Federal President for signature and promulgation.

If the Bundesrat wants the bill adopted by the Bundestag to be amended, it does not have the possibility to do so on its own. The only way to get the bill changed is to convene the Mediation Committee and negotiate for compromise with the Bundestag.

If the Bundesrat does not agree with a bill at all, it has the possibility - as long as the bill is a consent bill - to deny its approval. Consent bills are all bills amending the Basic Law, bills having a particular impact on the finances of the federal states or bills that impinge on the organizational and administrative jurisdiction of the federal states. They can only enter into force if the Bundesrat explicitly agrees. In case the Bundesrat denies its approval the Bundestag and the Federal Government have the right to convene the Mediation Committee in order to save their bill from failure.

Consent bills make up about 40 per cent of all the bills being adopted by the Bundestag. All other bills are so called bills of objection. If the Bundesrat does not agree with a bill of objection, it can convene the Mediation Committee. Only if the mediation procedure fails the Bundesrat can raise an objection, which can be overruled by the Bundestag. If the Bundesrat raises an objection with a two-thirds

majority, a two-thirds majority is also necessary in the Bundestag for rejection. If the Mediation Committee succeeds in finding a compromise, this compromise has to be approved by both the Bundestag and Bundesrat before the bill can enter into force.

#### IV. Composition

##### 1. Members

The Mediation Committee has 32 members - Bundestag and Bundesrat are represented on equal terms - each chamber having 16 members. A named alternate is nominated for every member.

The Mediation Committee is a standing committee which is constituted at the beginning of each legislative term of the Bundestag.

The committee is not a panel of experts recomposed for each meeting with regard to the bills on the agenda; its members are all-rounders; highly regarded and experienced members of the Bundestag and Bundesrat, who are capable of a close and trusting cooperation and who also have the authority to convince other members of the Bundestag or Bundesrat, above all the members of their political parties, to adopt the compromise reached in the committee.

The Bundestag is usually represented by the parliamentary whips and members with long-term experience.

From the Bundesrat's side the Minister-Presidents, the heads of government of the federal states, or experienced ministers from key departments such as home affairs, finance or justice are nominated as members of the committee.

Two main principles govern the activities of the committee: homogeneity and continuity: As a consequence the rules of procedure stipulate, that an alternate member is only allowed to participate in a meeting, if the regular member - he/she represents - is unable to attend. Moreover the rules of procedure allow only a limited number of member changes on the Bundestag and Bundesrat side each legislative term. Thus it shall be guaranteed that more or less the same members work together for the whole legislative term, building up an atmosphere of confidence which is the main ingredient to a successful mediation activity.

##### 2. Nomination procedure

The Bundestag nominates its members at the beginning of each legislative term with a formal vote in the plenary. The composition of the Bundestag delegation mirrors the political composition of the plenary (currently: CDU/CSU - 7 members, SPD - 5 members, The Greens - 2 members, LEFT party - 2 members).

Bundesrat members are nominated after a cabinet decision by the respective federal states. Each of the sixteen federal states has the right to nominate one member.

### 3. Personal independence of members

The members of the Mediation Committee shall not be bound by instructions. Personal independence is an important precondition to facilitate the capacity for compromise beyond party political boundaries. Committee members shall not be obliged to justify themselves for their voting behavior and their activities in the committee vis-à-vis the leaders of their political parties or their federal state governments.

However, committee members usually respect the positions of their political parties, especially as they have to convince them after a successful mediation procedure to adopt the compromise in the plenaries of the Bundestag and Bundesrat.

Nevertheless there have been cases when committee members have voted contrary to the official party guidelines because of their personal convictions, thus enabling the committee to find a compromise in the end.

### 4. Committee Chairmen

The Mediation Committee has two chairmen - one from the Bundestag, one from the Bundesrat. They take turns every three months. Traditionally one chairman belongs to the CDU and the other to the SPD.

The acting chairman sets the dates for the committee meetings. In doing so he usually consults with the Bundestag party whips and the political camps in the federal states. He determines the agenda and chairs the committee meetings. His position as chief negotiator requires a certain degree of neutrality. He mediates between different political positions and success or failure of the mediation procedure highly depend upon his negotiating skills.

### 5. Federal Government in the Mediation Committee

Pursuant to section 5 of the rules of procedure the members of the Federal Government have the right - and if the members ask for it - the obligation to attend the meetings of the committee. They have the right to speak anytime.

Usually the Federal Government is represented by the State Minister in the Federal Chancellery and the competent Federal Minister and/or the respective State Secretary. As 80 per cent of all draft bills are initiated by the Federal Government, it has a vital interest in attending the meetings of the committee in order to influence the negotiations, to offer alternatives and give its expert knowledge in order to save the bill at stake from failure.

### 6. Confidentiality of proceedings

The proceedings of the committee are strictly confidential. All members are obliged to maintain silence about the course of the negotiations. Breaches occur occasionally; in these cases the chairman can issue a reprimand.

Apart from the members/alternates and the representatives of the Federal Government, only the secretary and the staff of the committee - usually two lawyers

and one committee clerk - and a shorthand writer are allowed to participate in the meetings.

Section 6 of the rules of procedure states that other persons - like e.g. special experts - may only be admitted if the majority of the members agree. However, the committee has done this only in very rare cases. Usually, if the advice of special experts, particularly from the competent federal ministries is needed, the chairman suspends the meeting. On the days the Mediation Committee meets, working offices are provided for the staff/experts of the federal ministries concerned in the proximity of the committee room so that they are available to give the necessary information on short notice. In case of complex questions the proceedings may be suspended for a longer period assigning the mission to provide the required information to specially established working groups.<sup>3</sup>

With regard to the confidentiality of the proceedings the mediation committee has been called the "mysterious darkroom of legislation" - a point of criticism which is ultimately not justified.

Confidentiality is essential for the operability and the efficiency of the committee. Otherwise - with TV live broadcasting, journalists, party officials and private interest groups being present - a real mediation would no longer be possible. Looking for compromise always means that the negotiating parties have to renounce some of their own interests; compromise requires good will and concessions. Only very few politicians would dare to make concessions in public spotlight - especially in the weeks and months before elections.

Whereas the proceedings are confidential, the results of the mediation procedure - the compromise proposals - are immediately published after the closing of a meeting as printed matters of the Bundestag/Bundesrat and are available on the parliamentary websites. The compromise proposals are usually added to the next possible plenary meeting of the Bundestag and Bundesrat for debate. As the mediation results are only proposals, they are not binding and have to be formally adopted by both chambers so that the contested bill can enter into force in the end. Consequently the Mediation Committee is no "mysterious darkroom of legislation", but rather a secure and protected area for the search of political compromise.

The stenographic protocols however are only published at the beginning of the next legislative term after the next. Nevertheless protocols are directly made available to members of the committee and members of the Federal Government - as long as they have participated in the meeting in question - and to the Federal Constitutional Court in case they are needed in current court proceedings.

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<sup>3</sup> For details see V. 6.

## V. Principles of the mediation procedure

### 1. Subject of mediation

Only bills already adopted by the Bundestag and transmitted to the Bundesrat for deliberation can be subject of a mediation procedure. That excludes all other items like draft bills, ordinances, decrees or resolutions.

### 2. Right to convene the Mediation Committee

Primarily the Bundesrat has the right to convene the Mediation Committee, if its members do not agree with the contents of a bill adopted by the Bundestag. Article 77 paragraph 2 sentence 1 of the Basic Law states that the decision has to be taken within a period of three weeks after the bill has been forwarded by the Bundestag.

The Federal Government and the Bundestag only have the possibility to convene the committee if the Bundesrat has vetoed a consent bill - it is the only way to save a bill from failure. If a mediation procedure initiated by the Bundesrat - concerning a consent bill - has failed, the Federal Government and the Bundestag are both entitled to convene the committee once again to give the mediation procedure another chance. As far as consent bills are concerned theoretically three mediation procedures are possible. Bundestag and Federal Government are obliged to invoke the committee within "a reasonable period of time", so that there is legal certainty for the Bundesrat that its veto will not be contested any more.

The decision to convene the Mediation Committee has to be taken by the Bundesrat or the Bundestag plenary. If the Federal Government intends to convene the committee a decision of the cabinet is necessary.

### 3. Objective of the mediation procedure

The objective of a mediation procedure initiated by the Bundesrat is either to amend or to repeal a bill adopted by the Bundestag. The request to amend the bill can be limited to certain provisions. Nevertheless it is also possible to ask for a complete revision of the bill. This is called an "open invocation" of the Mediation Committee.

Bundestag and Federal Government can only convene the committee with the objective to save their bill from failure. They do not have to make any compromise offers at this stage.

### 4. Notice period

When the Mediation Committee has been invoked, pursuant to section 7 paragraph 1 of the rules of procedure the chairman can convene a first meeting only after a notice period of five days. Thus the members of the committee shall have a minimum time to prepare for the negotiations.

## 5. Voting procedures

Pursuant to section 7 paragraph 1 of the rules of procedure a quorum of twelve members is necessary for procedural decisions of the committee. Pursuant to section 7 paragraph 3 a quorum of at least seven members of the Bundestag and seven members of the Bundesrat is needed for the adoption of a compromise proposal. Each member has one vote. Decisions are adopted with a simple majority of the members present. In the case of a tied vote a compromise proposal is rejected.

## 6. Sub-committees and working groups

Pursuant to section 9 of the rules of procedure the Mediation Committee may set up sub-committees to prepare compromise proposals. In the last years the committee has used this instrument less and less and has increasingly decided to set up small working-groups instead. These consist of a small number of committee members, complemented by specialists and experts from the competent ministries.

Moreover members of the Mediation Committee have started to explore compromise options in informal round tables or discussion groups. Thus in the last years the compromise search has gradually been relocated from the committee to other informal bodies. Nevertheless these bodies have effectively developed compromise solutions, which could generally be adopted only after short discussions.

This practice is understandable. Bills get more and more complex and technical, especially those concerning finance or tax policy, social security or environmental protection. The members of the Mediation Committee who are no experts on these topics find it increasingly difficult to develop compromise solutions without expert assistance. Therefore they have come to appreciate the instrument of working groups and round tables very much.

The legitimacy and the composition of working groups and informal round tables has recently been the subject of a judgment by the German Federal Constitutional Court.<sup>4</sup>

The background was the following: In a mediation procedure in 2010 the committee decided to set up a working group, in which only members of the CDU/CSU, SPD, FDP and the Green Party were represented, whereas a representative of the LEFT party was excluded. The same happened when several informal round tables met in order to assist in the search for compromise. The LEFT party pursued the case before the Federal Constitutional Court arguing that the composition of the working group and the round tables had to mirror the composition of the Mediation Committee and that the LEFT party had the right to be represented at least by one member. The Court didn't share that view and stated in the first instance that the Mediation Committee may use formal and informal bodies to prepare political compromise between Bundestag and Bundesrat. Moreover the Court ruled out that these bodies

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<sup>4</sup> Judgment of the German Federal Constitutional Court of 22 September 2015, file ref. 2 BvE 1/11, Press release (in English) No. 70/2015 of 22 September 2015, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2015/bvg15-070.html>

may be composed according to other criteria than mirroring the composition of the Mediation Committee and that not all political parties represented in the committee were necessarily entitled to be admitted.

## 7. The result of a mediation procedure

The committee has several possibilities to settle a mediation procedure:

The first and most frequent result of a mediation procedure is the amendment of a contested bill. The proposal has to be a fully formulated legislative text; declarations of intent in prose or general principles of a compromise are not sufficient.

Another possibility - which practically never occurs - is the proposal to repeal a bill.

Sometimes the Mediation Committee recommends to confirm the bill. This might happen, when the Federal Government succeeds in convincing the committee of the quality or necessity of a bill - then a confirmation might be the result. Sometimes - especially when there is more than one bill on the agenda - the committee opts for a "package solution". This means that the committee agrees on a compromise on one bill, at the same time accepting a confirmation of another bill as a kind of compensation.

If the Mediation Committee does not succeed in finding a compromise the mediation procedure can be concluded without agreement. However the committee is only entitled to declare the failure of a mediation procedure after three unsuccessful rounds of deliberations, thereby preventing the early failure of mediation efforts.

## 8. Acceptable limits of compromise proposals

If the Mediation Committee agrees on a compromise proposal there are certain limits as regards its contents:

The determination of the negotiating framework can be quite difficult. Since the 1980s this question has been the subject of several judgments of the Federal Constitutional Court. The Court has repeatedly stated<sup>5</sup> that the Mediation Committee is only entitled to propose compromises which have been the object of the parliamentary debate in the Bundestag. This means that they must have been part of the legislative procedure leading to the adoption of the contested bill. The Court ruled out that especially the interests of the members of the Bundestag - as elected representatives - have to be respected. Only those options that have already been discussed in detail in the Bundestag may be included into a compromise proposal by the Mediation Committee. These proposals should reflect the parliamentary debate and should not come as a surprise to anyone. The Court justified this with the fact that the Bundestag and Bundesrat only have the possibility to adopt or to reject a compromise proposal elaborated by the Mediation Committee - as per an all or nothing principle - and that there was no way to amend these proposals.

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<sup>5</sup> Most recently: Judgment of the German Federal Constitutional Court of 8 December 2009, file ref. 2 BvR 758/07, Press release No. 2/2010 (in English), <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2010/bvg10-002.html>



Consequently there are very strict standards as regards the acceptable limits of compromise proposals. These standards lead to a consequence that the Court apparently has not taken into consideration: The Committee is not entitled to include fresh ideas into its compromise proposals but is limited to ideas thus far discussed in the Bundestag. This reduces the effectiveness of the mediation procedure significantly. It remains to be seen whether the Court will revise its point of view when new cases concerning the limits of compromise proposals will be brought before it.

#### VI. Further procedure concerning compromise proposals in the Bundestag and Bundesrat

After the successful termination of a mediation procedure the committee appoints two rapporteurs - one for the Bundestag, one for the Bundesrat. Their task is to present the compromise proposal to the Bundestag and Bundesrat plenary and give a report about the mediation procedure.

The results of the mediation procedure can be discussed. There is no possibility to change or amend them. The members of both the Bundestag and Bundesrat only have the possibility to adopt or reject the compromise proposal. Once both chambers have adopted the proposal, the bill will be transmitted to the Federal President for signature and promulgation.

By now it must be clear that the assertion - mentioned in the beginning - that the Mediation Committee was a "substitute or superordinate parliament" is refuted. The committee has no competence to take binding decisions, but only to make recommendations or proposals that have to be adopted by the plenaries of both legislative chambers.

#### VII. Impact of particular constellations in the balance of political power

In the history of the Mediation Committee it has been evident that the committee was convened more often in periods when the political majorities in the Bundestag and Bundesrat differed.

In the 1970s a SPD/FDP-led government and a respective majority in the Bundestag had to face a CDU-dominated Bundesrat. In the 1990s Helmut Kohl's CDU/FDP-government and the Bundestag were confronted with a SPD-led Bundesrat. At that time the number of bills sent into the Mediation Committee was rather high; the political parties representing the Bundestag opposition used their majority in the Bundesrat to invoke the Mediation Committee in order to correct or uphold bills.

A climax of the activities of the Mediation Committee was reached between 2002 and 2005, with Gerhard Schroeder's SPD/GREEN-government and the Bundestag facing a CDU-dominated Bundesrat. In this period a total of 100 bills - that was 25 per cent of all bills adopted by the Bundestag - were sent into the mediation procedure. The committee met nearly every week. The highlight were the negotiations of Chancellor Schroeder's "Agenda 2010" - a wide ranging reform of the labour market and the social security system -, when the committee sat on ten consecutive days and nights working its way through 3000 pages of legal texts.

But the Mediation Committee was never used as an instrument of gridlock. A look at the statistics will prove this. For example in the time between 2002 and 2005 only 12

bills out of 100 failed - among these were 11 bills, where the parliamentary debates could not be concluded because the Bundestag was dissolved one year earlier than scheduled. That leaves only one bill which could not enter into force - a bill on animal food.

The committee has thus worked very successfully finding compromise solutions for many contested bills, which were of vital interest for the country as a whole, e.g. the above mentioned Agenda 2010, a tax reform, a reform of the health care sector, a new immigration law - just to name a few.

In the times of the Grand Coalition (CDU/SPD) between 2005 and 2009 with mostly the same political constellation in the Bundestag and Bundesrat the number of mediation procedures dropped decisively to 18 out of 616 bills adopted by the Bundestag. The federal states used the Mediation Committee primarily to promote their interests vis-à-vis the Bundestag and the Federal Government. The main point of dispute was the distribution of costs and revenues between the Federation and the federal states in some legislative acts (e.g. Housing Allowances Act, Family Allowances Act, Reform of the Motor Vehicle Tax). Regardless of their political affiliation the federal states stood together as one and succeeded in negotiating decisive improvements.

In the current legislative term, which started in 2013, and saw a new edition of the CDU/SPD Grand Coalition, the Mediation Committee has only been constituted after two years in September 2015. In the first two years one can say that no mediation procedure was necessary because conflicts of interests and differences of opinion were resolved by the Federal Government before sending a potentially contested bill into the legislative procedure. The first case where this mechanism didn't work was the so called Regionalization Act in summer 2015, which provided new regulations concerning the share of the Federal Government in the costs of public transport in the federal states. Nevertheless the Mediation Committee has once again shown its effectiveness settling this long time dispute between the federation and the federal states within less than a month.

What are the future prospects? Until the end of the legislative term in autumn 2017 there will be very few mediation procedures. The governing coalition will continue to resolve conflicts before they get carried into the legislative process. There might be individual cases, especially when the financial interests of the federal states are concerned, where this mechanism will not work and the committee will be invoked. After the Bundestag elections in 2017 the role of the Mediation Committee might be redefined depending on the then prevailing political constellations.

## VIII. Conclusion

Coming back to the initial questions - the following conclusions can be drawn:

The Mediation Committee is no "substitute or superordinate parliament". It only works out compromise proposals which have to be adopted by both the Bundestag and Bundesrat.

The Mediation Committee is no "mysterious darkroom of legislation", but rather a secure and protected area for open discussion and compromise search thus

promoting the efficiency of legislation. Confidentiality is essential for the success of mediation activities. Transparency is guaranteed through the immediate publication of compromise proposals as printed matters and on the parliamentary websites. Rapporteurs give a detailed account of the mediation procedure and its results before Bundestag and Bundesrat vote on them.

As the Mediation Committee has worked very successfully in more than 65 years of its history - finding efficient and feasible solutions for pressing problems of German politics, it is more than justified to call it "one of the most felicitous innovations in our constitutional activities".

With its permanent efforts for compromise the Mediation Committee makes an important contribution to ensure and promote the acceptance of political decisions in our society and is thus one of "the most positive institutions of the Basic Law".